No. 332. 95

Motion to dismiss or Affirm.

Filed Dec. 27, 1898.

Office Supreme Court U. S.
FILED
DEC 27 1898
JAMES H. McKENNEY,
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

THE FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY,
Plaintiff in Error,
vs.
WILLIAM J. BELL, ET. AL.,
Defendants in Error.

No. 332.

Motion to Dismiss or Affirm.

Come now the defendants in error by H. Bisbee, their attorney, and move to dismiss the writ of error in this action, or affirm the judgment, upon the following grounds :

First—Because no writ of error lies as matter of right to review the judgment of the Circuit Court of Appeals. The question of jurisdiction was raised in the Circuit Court by plaintiff in error, and judgment went against it on that question and on the merits, and on writ of error, the Circuit Court of Appeals affirmed that judgment.

Second—On the ground that it was an action in ejectment and the plaintiff in error, defendant in the Circuit Court, admitted of record that it had no title, and therefore the only question it could raise was one of jurisdiction, and that has been so often upheld by this Court in like cases as to need no further argument.

Third—On the ground that if the writ of error does lie there is no basis in the record for the assignments of error, and they should be treated as stricken out, and the judgment affirmed.

N Bisbee
for defendants in Error

Please take notice that the foregoing motion will be made and submitted to the Court on Monday, the sixteenth day of January, 1899.

N Bisbee
for defendants in Error

To JOHN A. HENDERSON, ESQ.,
J. C. COOPER, ESQ.,
W. W. HOWE, ESQ.,
Attorneys for Plaintiff in Error.

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Brief of Bisbee for M. C.

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THE FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

WILLIAM J. BELL, ET. AL.,
DEFENDANTS IN ERROR.

No. 332.

BRIEF ON MOTION TO DISMISS WRIT OF ERROR OR AFFIRM THE JUDGMENT.

Statement of Facts.

On December 12th, 1896, defendants in error brought an action of ejectment against the plaintiff in error in the Circuit Court of the United States for the Southern District of Florida, to recover possession of a strip of land upon which defendant below had built a railroad, and for mesne profits during the occupation.

The declaration claimed title under a patent granted on a pre-emption claim filed in the local Land Office in 1883, and duly prosecuted by Louis Bell, Senior, and plaintiffs below, his heirs, until patent was granted, to wit: July 1896.

The plaintiffs also claimed mesne profits during the occupation by defendant Company both before and after patent issued.

The declaration also alleged that the defendant Company at all times during the proceedings in the local Land Office, and in the general Land Office of the Government, and before the Secretary of the Interior of the United States, resisted the right of the said Lous Bell, and his heirs, to patent to the land in question, and that the defendant Company claimed the right to locate and maintain its line of railroad on said land, under a law of the United States.

Declaration, Record, page 3.

The defendant Company, on February 1st, 1897, filed a plea of "Not Guilty." Record, page 5.

Sub-division 2, Section 1513 Revised Statutes of Florida, page 513, reads as follows, to wit:

"2. PLEA—The plea of "Not Guilty," shall put in issue the title of said land in controversy."

"Such plea shall be held to admit the possession of the defendant, or in case of an adverse claimant, the adverse claim of the defendant. Should the defendant wish to deny possession it shall be done by special plea."

On February 5th, 1897, after time for pleading expired, defendant moved for leave to file the four additional pleas numbered 2, 3, 4 and 5 respectively, *but it did not offer to withdraw the plea of "Not Guilty."* Record, pages 7 to 9.

On February 18th, 1897, the Court refused leave to file said special pleas on the ground that none of them constituted a defence which could be made under the plea of "Not Guilty." Record, pages 9-10.

On the 10th day of February, of said year, the defendant made a motion for continuance, based on an

affidavit stating that it had condemnation proceedings pending in the State Court to acquire an easement over the said lands. It asked for a continuance until such condemnation proceedings could be terminated. Record, page.

This motion was denied. Record, pages 10 to 12.

On the 5th of March, 1897, the defendant Company made the following motion, to wit:

"Now comes the defendant in the above cause on this day, and moves the Court to dismiss the said cause for the reason that there is nothing upon the face of the declaration to show that this Court has jurisdiction to hear and determine the said cause." Record, page 12.

This motion was denied on the 11th day of March, said year. Record, page 12.

On the 11th day of March, said year, the parties waived a jury and agreed that the cause might be tried by the Court. Record, page 13.

On March 23rd, the Court found in favor of the plaintiffs and rendered judgment for possession, and nineteen hundred and fifty-five dollars, ($1,955), for mesne profits, and from that judgment the defendant Company prosecuted a writ of error to the Circuit Court of Appeals for the Fifth Circuit, and on May 24th, 1898, said judgment was affirmed by the Court of Appeals.

87 Fed. Rep. 369;

Findings of Court on page 14.

The case is now in this Court on writ of error to review the said judgment.

Argument.

This motion to dismiss the writ of error is based on the following grounds:

I.

The defendant in the Circuit Court raised the question of jurisdiction, which was decided against it. Judgment went against defendant, and it took the whole case on the question of jurisdiction and the merits to the Circuit Court of Appeals, and the Circuit Court of Appeals did not certify the question of jurisdiction to this Court.

The second plea offered, leave to file which was denied by the Court, and affidavit for continuance *distinctly admits that defendant had no title to the land in controversy, and sought to defeat the jurisdiction of the Court by such admission.* See Proposed Plea 2, Record, page 7. Affidavit, page 10.

The Circuit Court of Appeals held that the only question before it on the assignments of error which it needed to examine was a question of jurisdiction. See 87 Fed. Rep., 371, 373. And the plaintiff in error in this Court has filed the same *identical assignments of* error that it did in the Circuit Court, and the only error assigned which is assignable, if any is, is one challenging the jurisdiction of the Circuit Court, and for this reason the plaintiff in error ought to have brought the case before this Court directly by writ of error from the judgment of the Circuit Court, and no writ of error lies as matter of right to review the judgment of the Circuit Court of Appeals.

See Assignments of Error in Circuit Court, page 16.

See Assignment of Error in the Court of Appeals, page 182.

But, if such writ does lie, the defendant, having admitted of record, that it does not claim title, and has no defense, the only question that can possibly remain is that of the jurisdiction of the Court. That question has been so often decided by this Court, sustaining jurisdiction in cases identical with this, that it is frivolous.

II.

The writ should be dismissed on the ground that there were no exceptions taken upon which error can be assigned; and there is no basis in the record upon which assignment of errors can rest.

Argument.

Twelve errors are assigned in this Court. *They are exact repetitions of the assignments in the Court below,* adding the words: "*The Court of Appeals erroneously affirmed said ruling*" (*of Circuit Court.*)

There is *no specification in any one of these assignments of the grounds of the alleged errors,* therefore there is nothing to review.

See Assignments, Record, page 182.

The Court of Appeals declined to review any assignment of error, except the one challenging the jurisdiction of the Circuit Court.

87 Fed. Rep., 373.

And defendant, having admitted it had no *title,* there was no other question for such Court to review.

FIRST ASSIGNMENT OF ERROR.

The first error assigned, Record, page —, is that the Court below erred in holding that it had jurisdiction on the ground of citizenship of parties. There is no basis in the record for this assignment of error. 87 Fed. Rep., 373.

There is nothing in the record establishing that the Court below held that it had jurisdiction on the ground of citizenship. The only mode in which defendant raised the question of jurisdiction was by motion to dismiss upon the ground that on the face of the declaration, no jurisdiction was shown. Record, page 12.

And this was repeated in the so-called bill of exceptions, Record, page 170.

But, if the Court of Appeals held there was jurisdiction because of diverse citizenship this Court has no jurisdiction to review it.

FOURTH ASSIGNMENT OF ERROR.

The fourth error assigned is for the refusal of the Court to dismiss for want of jurisdiction. Record, page 183.

The facts stated in the declaration established jurisdiction on two grounds.

1. Because the plaintiffs claim title as patentees, or as heirs of Lewis Bell, under a patent from the United States, upon a pre-emption claim under the laws of the United States, and the declaration alleges that the defendant insists that the plaintiffs derived no title to the said land by virtue of said patent.

It has several times been held that where the plaintiff claimed *title directly under a patent from the United*

States, and defendant denied such title, the case was within the jurisdiction of the Court.

125 U. S., 618-620.

Pierce vs. Molliken, 78 Fed. Rep., 196, (Reported since the decision of the Court below.)

That case is almost identical with this branch of the present case. In that case the question was raised by demurrer to the declaration, and in this case, by motion to dismiss.

Also Evans vs. D. L. & W. Coal Co. (8th Circuit Court of Appeals), 80 Fed. Rep., page 433.

That case is identical with the case at bar, both on the ground that plaintiffs claim title under a patent, and *mesne profits before patent issued*, under the doctrine of relation of the title to the date of the initiatory steps to obtain title under the laws of the United States. That, like this, was a case under the pre-emption laws.

The case of Spokane Falls &c. R. R. vs. Zeigler, 167 U. S., 65, is decisive upon both points, to-wit:

Jurisdiction, because of claim of title under the laws of the United States, and because of the claim for mesne profits for use and occupation before the patent issued. That case in principle is identical with the case at bar.

The challenge to the jurisdiction after so many decisions sustaining *it, is frivolous.*

The plea of not guilty put the title in issue.

Rev. Stats. of Fla., Sec. 1513,
giving the form of the declaration, and the effect of the plea of not guilty, and citing the decisions in numerous cases by the Supreme Court of the State.

And it was the issue raised upon that plea upon which the case was tried.

SIXTH ASSIGNMENT OF ERROR.

This assignment alleges error in excluding the record of a chancery suit between the parties to this case, offered by the defendant. Record, page 183.

The defendant offered this record for the purpose of showing *good faith* of the defendant in entering upon the tract of land. The Court sustained the objection to its admission because there was no claim to vindictive or exemplary damages, and consequently the question of good faith was not in issue. Record, page 113.

The record of the suit is in the Record, pages 113 to 140 inclusive. It simply establishes that the heirs of Bell, in the latter part of 1889, brought a suit to enjoin the defendant company from constructing its road across the land in question, on the ground that they had the right of pre-emption under the pre-emption laws of the United States, and would prosecute their claim to a patent.

The Court granted the injunction, but provided that it might be dissolved: (1) Upon the defendant obtaining a decree of condemnation: (2) Upon giving bond conditioned to pay all damages that might result to the complainants in the construction and building of its railroad whenever the complainants should obtain title from the United States.

There was no plea filed in abatement on the ground that another suit was pending, and if such a plea had been filed, it would have been unavailing.

Kittredge vs. Race, 92 U. S., 116.

101 U. S., 301;

And it is manifest that the suit in equity was not for the same purpose as the ejectment suit. The object of the equity suit, to-wit: enjoining the construction of the road had been defeated by the defendant giving bond and building the road, and after patent was obtained, the proper remedy of the plaintiffs to recover possession and mesne profits was by ejectment. Had the equity cause gone to a final decree plaintiffs might, after patent was obtained, enjoined the defendant from operating its road, *but it is exceedingly doubtful whether the Court of Equity had jurisdiction*, even on a supplemental bill to have decreed damages for use and occupation, and for injury to the realty.

SEVENTH, EIGHTH AND NINTH ASSIGNMENTS OF ERROR,

go to the point that the Court erred in finding, as matter of law, that the plaintiffs were entitled to recover for mesne profits and damages prior to issuing the patent, which question is disposed of, against the contention of plaintiff in error by the cases in

80 Fed., Rep., supra,

22 Fla., 255, 261-2,

167 U. S., supra,

and by numerous other cases unnecessary to cite.

This contention is frivolous.

TENTH ASSIGNMENT.

This for finding amount due for mesne profits; *a finding of fact, not reviewable.*

There is no basis in the record for the Seventh, Eighth, Ninth and Tenth Assignments of Error. Record, pages 170, 171.

These pages *include four distinct findings of law and fact*, and the only exception thereto is on page 171, and is as follows, to-wit:

"*To which findings of law and fact, the defendant then and there excepted and alleges and complains that the Court erred therein.*"

This is not such an exception as the Court can review. It states no ground of exception whatever, and no assignment of error can be based thereon.

ELEVENTH AND TWELFTH ASSIGNMENTS OF ERROR.

These assignments go to the point that there was not such description of the width of the right of way occupied by the defendant, in the declaration, as to enable the Court to determine the width of said right of way, and the quantity of land occupied by the defendant. In other words, that the Court could not determine from the declaration, and upon the evidence, the area of land for which the plaintiff should have judgment and the amount of damages to be sustained for use and occupation. This finding of the Court is on page 171.

This was a finding of a fact.

FIFTH ASSIGNMENT OF ERROR

Is for refusal to grant the motion for continuance, on the ground that a condemnation suit was pending. It will be sufficient to say that refusal to grant a continuance is not reviewable; but it is well settled that the pendency of a condemnation proceeding is no bar to a suit in ejectment, or for mesne profits, or for damages.

2 Woods R. R. Law, 292, 293 and Notes.

This for the obvious reason that the judgment in condemnation proceedings is to pay the value of the

property. Liability for mesne profits and damages to the realty are not involved in such a proceeding.

Moreover, after judgment, the plaintiff may abandon the condemnation proceedings, and the judgment becomes null and void, unless the defendant pays the amount he is condemned to pay within ten days after judgment.

Rev. Stats. of Fla., Sec. 1555.

Again, a judgment in condemnation does not give the defendant a fee simple title, but only an easement.

Rev. Stats. Sec. 1554.

The plaintiff is entitled to have the question of title settled, so that in case the defendant should subsequently vacate the premises, the right to possession under the title would revert to the plaintiff.

2 Woods R. R. Law, page 915, and notes.

The condemnation proceedings are in the Record p. 144. On Record p. 148 it will be observed that the petition of the defendant for condemnation of the land was *dismissed.* After plaintiff in ejectment in such a case recovers a judgment, the Court in some jurisdictions on a proper showing will give defendant a short time to proceed to acquire the land by condemnation, but it is no ground to stop the trial of the ejectment suit.

THIRD ASSIGNMENT OF ERROR.

This alleges error for refusal to permit the defendant to file additional pleas numbered two, three, four and five, which pleas are in the Record pp. 7 to 9 inclusive.

The refusal by the Court of leave to file pleas is not reviewable. It was discretionary 142, U. S., 128.

The time to plead as a matter of right has passed.

The second proposed plea attempts to defeat the jurisdiction of the Court by averring that under the patent, the defendant did not deny at the *time suit was brought* that the plaintiff had title to the premises, coupled with an averment that the defendant admits that *at the time of the commencement* of this suit, it had no title.

The third proposed plea attempted to set up that one of the plaintiffs was non compos mentis. The plea of not guilty is a plea to the merits, and a plea to the merits waives the question of competency to sue, and also waives jurisdictional questions, so far as they can be waived.

14 How., 510;

3 Wall., 420-423.

There is no law in Florida which prohibits a wife, who is non compos mentis, from being joined with her husband, as in this case in an action in ejectment. The title is still in her. She may sue by guardian, *but it is not compulsory.*

Revised Statutes of Florida, Section 982.

Besides, the plea was bad in not alleging defendant had been *adjudged a lunatic.*

23 Fed., 168;

87 Fed., 374.

The fourth proposed plea admits that the defendant is a trespasser, and that condemnation proceedings had been instituted, and there is no merit in it.

The fifth proposed plea was setting up the pendency of the equity suit already spoken of, which suit was not for the same object and purpose as this suit, and it contained no merit.

SECOND ASSIGNMENT OF ERROR.

This assignment of error asserts that the Court below held it had jurisdiction, notwithstanding the defendant insisted that it did not claim a title to the land under the laws of the United States, and admitted the title of the plaintiffs under the patent.

There is nothing in the Record establishing that the Court ever rendered any such decision. The Court disposed of the application to file all the additional pleas by an order found on page 9 of the Record. The order simply held that none of the pleas constituted *any defence which could not as well be shown under the general plea of not guilty, without prejudice to a motion for stay of execution until judgment on condemnation proceeding.*

The proposed plea ought not to have been filed for several reasons:

First. It was inconsistent with the plea of not guilty which plea the defendant never proposed to withdraw. Under the plea of not guilty, the defendant had the right to introduce evidence, and contend that the plaintiff had no title and had no right to mesne profits.

Second. Because the proposed plea No. 2, *was not a disclaimer of any interest in the subject matter of the suit.*

Third. Because as the record shows, but a short time before the suit was brought, the defendant did claim a right of way over the lands under the laws of the United States. See Letter of the Commissioner of the General Land Office, to the Local Land Office, Record, page 50, and the decision of the Secretary of the Interior on appeal to the Commissioner of the General Land Office, Record, pages 29 to 35 inclusive.

The plaintiffs therefore had the right to allege just what they did allege, to-wit: that the defendant denied

its title, and right to mesne profits. *Just at what moment of time* the defendant concluded to admit title in plaintiffs whether before or after the suit was brought, we think it would be impossible to prove or disprove. The plea does not distinctly disclaim a right of way. It does not admit a right to mesne profits.

But the case of Osborne vs. The Bank, 9 Wheat, *supra*, disposes of this, where it was held that if the declaration showed a case within the jurisdiction of the Court it is immaterial whether the defendant raised any objection or not.

Fourth. Because the admission of title in the plaintiff under the patent would not preclude the defendant from claiming an easement over the land which is all it could acquire, either under the laws of the United States, or the Revised Statutes of Florida.

Fifth. Because the defendant contended at the trial, that under the laws of the United States, plaintiff was not entitled to a judgment for mesne profits, or for damages either before or after the patent issued. See Assignments of Error 7, 8, 9 and 10, Record, pages 183-4.

Sixth. Even if the defendant had withdrawn his plea of not guilty, and filed a paper amounting to an absolute disclaimer of any interest in the property, or a judgment by default had been taken against the defendant company, still the declaration shows a case under the laws of the United states, because the plaintiffs would still have to establish, as they did establish, that they were entitled to mesne profits from the time they initiated their claim under the pre-emption laws, or at least from the time they tendered the Government price for the land under the pre-emption laws. This point is well settled.

80 Fed. Rep., 443, 167 U. S. 65.

Not only that, but the plaintiff, under the conditions stated, would have to prove that the patent was duly executed, and that the land was subject to pre-emption claim, and that it had not been previously disposed of under the laws of the United States.

We repeat the proposed plea did not admit plaintiff's right to mesne profits nor damages to realty, and the rights of possession and mesne profits, before patent depended absolutely upon the pre-emption laws of the United States.

Revised Statutes United States, Sections 2257 to 5270.

We may have unnecessarily mingled argument on other questions with argument to establish that *there is not in the record*, any basis for the assignment of error.

It is a fundamental rule, needing no authority, that, where there is no plain error, in the Record unassigned, as in this case, and no basis for the errors assigned the writ will be dismissed or judgment affirmed. It is submitted:

First—The writ should be dismissed for that reason.

Second—It should be dismissed, because the writ does not lie as a matter of right, in such a case.

AFFIRMANCE

Third—Even if the Court has jurisdiction it is manifest the writ was taken for delay only, and the question of jurisdiction and other questions have been so often upheld in like cases, that they are so frivolous as not to need further argument.

Hinckey vs. Morton 103, U. S., 764.

Evans vs. Brown 109, U. S., 180.

Foster vs. Kansas 112, U. S., 296.

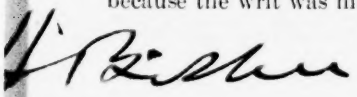
The precise questions that there was jurisdiction *both on the ground* that plaintiffs claimed *directly under a patent against defendent denying their title by a plea of not guilty*, and on the ground of *claiming mesne profits* under the laws of the United States, prior to the issue of the patent have been settled by this Court.

Doolon vs. Carr 125, U. S., 618.

Railway Co. vs. Zeigler 167, U. S., 65, and by Court of Appeals 87, Fed. Rep. 373–4.

The decisions, ruling that there was no jurisdiction, where the plaintiffs *derived title through a patent have no application to the case at bar.*

If a motion was pending to strike from the record the assignments of error, because there is no basis for them, unquestionably it would be granted. This being so the judgment should be affirmed, with damages, because the writ was made out for delay only.



H. Bisbee,
for Defendants in Error.